

UNITED STATES OF AMERICA

**Commission Ruling
D-033**

**Motion to Compel Production of
Transcripts in Arabic**

v.

KHALID SHEIK MOHAMMED et al

2 October 2008

1. Nature of Motion:

a. This joint motion seeks to compel production of draft copies of all pretrial motion sessions as they are prepared, a written Arabic Translation of the transcripts, and the opportunity to object to and submit corrections to the transcripts.

b. The Commission has also considered the prosecution's response to D-033, the oral argument regarding this motion and the supplement submitted by the defense on 24 September 2008.

2. Discussion:

a. MCA, Section 948l provides that: "The transcript of a military commission [shall] be under the control of the convening authority of the commission, who shall also be responsible for preparing the record of trial." MCA, Section 949o(a) provides that: "Each military commission [shall] keep a separate, written verbatim, record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge." MCA 9490(c) provides that: "A copy of the record of the proceedings of the military commission [shall] be given the accused as soon as it is authenticated."

b. Beyond the controlling statute, the rules governing preparation and authentication of the transcript of the proceedings are contained in RMC 1103-1104 and RC 6-10.

c. RMC 1103(e) provides that "Except when unreasonable delay will result, subject to review of that determination by the military judge, prior to authentication, the trial counsel shall permit the defense counsel to examine the record before authentication.

d. RC 6-10 provides:

Transcript of the Proceedings. In accordance with R.M.C. 1103, during the course of a trial, the transcript of the proceedings of any session will be provided to the Military Judge who presided over the session in question before it is given to any other person or to the parties. In accordance with R.M.C. 1103 and R.M.C. 1104, prior to authentication of the record of trial, only the Military Judge can authorize the release of the unauthenticated transcript or any portion thereof. At the direction of the Military Judge, the court reporter will provide the transcript or portions thereof to counsel for errata purposes prior to authentication.

e. Under these rules, an accused's first entitlement to review the transcript of the proceedings arises in conjunction with the authentication process wherein the defense shall be permitted to examine the record of trial, identify perceived errors and offer proposed corrections.

f. Prior to review in conjunction with the authentication process, counsel (or *pro se* accused) for either side may request production of unauthenticated portions of the transcript for use during subsequent portions of the trial. While RC 6-10 does not create any entitlement to provision of the unauthenticated portions of the record during the course of the trial, thus far, the Military Judge has granted such requests, subject to an appropriate order concerning limited use, when the requested portions of the transcript have been available. The transcripts are produced in the English language and are not translated into Arabic in the normal course of the proceedings.

g. The defense argues that production of Arabic translations of the transcripts should be compelled to assist the accused in understanding the proceedings and to assist the accused in preparing their motions in the course of the on-going litigation. In support of this argument, the defense cites numerous cases in which production of transcripts from prior completed trials was ordered in conjunction with an appeal or *habeas* petition concerning the prior trial. None of the cited cases suggest that there is an entitlement to on-going receipt a trial transcript during the course of a criminal prosecution. Additionally, the cited cases clearly contemplate provision of existing transcripts, vice imposing a requirement on the government to produce translated versions of the record that are not contemplated in existing rules of procedure. It is also worthy of note that the United States Court of Appeals for the Second Circuit has ruled against claims of a translation requirement on at least two occasions. *See Zapata v. Mukasey*, 2008 U.S. App. LEXIS 8398; *United States v. Wattanasiri*, 1998 U.S. App. LEXIS 4432)

h. The defense also argues that translated transcript production is required to ensure the accused's understanding of the proceedings. MCA, Section 948l makes the following provision regarding translation of military commission proceedings: "Under such regulations as the Secretary of Defense may prescribe, the convening authority [may] detail to or employ for the military commission interpreters who shall interpret for the commission and, as necessary for trial counsel and defense counsel and for the accused." RMC 502(e) and the Regulation for Trial by Military Commission, Section 7-

3 provide for provision of interpreters for the defense as necessary. The Commission would expect the defense to pursue provision of interpreter services for the defense teams to the extent necessary under these provisions.

i. D-018 is a joint motion by the defense concerning alleged inadequacies of the in-court translations by the Commission Translators. This matter will be addressed separately.

3. Ruling:

a. That portion of the defense motion pertaining to compelling production of draft copies of all pretrial motion sessions as they are prepared is denied. Requests for production of unauthenticated portions of the transcript of the proceedings will be addressed in accordance with RC 6-10.

b. That portion of the defense motion pertaining to compelling production of an Arabic Translation of the transcripts is denied.

c. That portion of the defense motion pertaining to providing the defense the opportunity to object to and submit corrections to the transcripts is granted insofar as the opportunity will be provided in due course in accordance with RMC 1103(e) prior to authentication of the record of trial.

A handwritten signature in black ink, appearing to read 'R. H. KOHLMANN', written over a horizontal line.

RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge